



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

# VIRGINIA LAW REGISTER.

---

VOL. III.]

NOVEMBER, 1897.

[No. 7.]

---

## THE TRIAL OF AARON BURR.\*

---

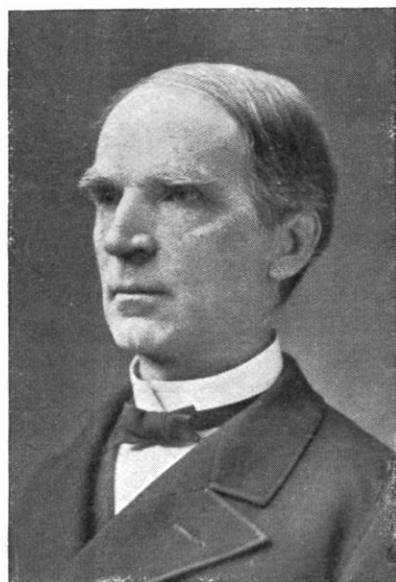
*Gentlemen of the Virginia State Bar Association :*

Perhaps no member of this Association would have appreciated more highly the honor conferred by the election, as its president, than myself. From my early boyhood I desired to become a lawyer. My profession has been my life's work, and my earnest endeavor has been to render myself, both in acquirement and conduct, a worthy member of our most honorable calling. To be honored by my brethren is therefore to me an honor indeed. And this honor is greatly enhanced in value when I consider the personnel of this Association and the distinguished jurists who have preceded me as its presiding officers. Indeed, when we consider the high character which has always been borne by the Virginia bar, the genius and acquirements which have distinguished so many of its members, we may justly be proud of the past; while we should feel, in view of that past, the greater responsibility of the present and the greater obligation towards those who are to succeed us. And in performing the duties incumbent upon us, we cannot too often seek inspiration from the examples of those who have made the page of our history glorious. Indeed, it is the special duty of our Association to keep green their memories.

Thoughts like these have determined me, in the address it becomes my duty to make on this occasion, to direct your attention for a brief period to a great case, which ninety years ago brought the Richmond bar prominently before the continent, and won for it the distinction of being the equal of any, if not the ablest, bar in the United States; a case in which our greatest judge presided over the trial of a man great in intellect and position, indicted for the greatest of all crimes, by the most distinguished grand jury that was ever impaneled, and in which both the prosecution and defense included some of the foremost advo-

---

\* Address of Hon. William Wirt Henry, President of the Virginia State Bar Association, delivered before that body, August 3, 1897.



WILLIAM WIRT HENRY.

cates of the day. The case I have selected is the trial of Aaron Burr for treason, in the year 1807, before the United States Circuit Court, at Richmond.

Before entering upon his trial, let me recall some of the prominent events in the life of Aaron Burr. If there be any truth in the claim that talents are hereditary, Aaron Burr was entitled to the great talents he possessed by right of inheritance. His father, a Presbyterian divine, was a man of extraordinary intellect, of great learning, and of commanding eloquence. Selected as the second president of Princeton College, he for nine years directed its affairs, laying the foundation of that great school of learning. The beautiful and gifted daughter of the great Jonathan Edwards was the mother of Burr. But if moral qualities, like physical and mental characteristics, are likewise hereditary, Aaron Burr exhibited a notable exception to the rule. His parents were both deeply pious, but both died while he was a youth, and he early developed an alarming tendency towards irreligion, as regards faith, and immorality in regard to conduct. In truth, he deliberately discarded Saint Paul as a model in manners and conduct, and selected as his model the polished and immoral Lord Chesterfield. In doing this he turned his back on the sincere piety and uprightness of his parents, and under the exterior of a polished gentleman he concealed the depraved morals of a Rochester.

The early development of young Burr was phenomenal. At the age of thirteen he entered Princeton, for which he was prepared at eleven, but was refused on account of his age; and at sixteen he graduated with the highest honors of the institution. His reputation as the most brilliant student ever educated at the College remained until it was equalled, if not eclipsed, by a son of Judge Roger A. Pryor, Theoderick Pryor, whose early death deprived his country of a genius of the first order.

Soon after leaving college young Burr volunteered in the Continental army besieging Boston, and was in the fatal expedition against Canada. In the assault on Quebec he greatly distinguished himself as aid to the ill-fated Montgomery, and he refused to leave the field with his retreating comrades till he had secured the body of his stalwart commander, which, though small of stature, he bore upon his shoulders beyond the reach of the British. His cool and imperturbable conduct in action won for him great applause; and, on his return from Canada, Washington gave him a position on his staff. But that admirable judge of men soon discovered that Burr was lacking in the moral principles

which lay at the foundation of all good character, and the two men parted with feelings of aversion, never changed in after life—Washington regarding Burr as thoroughly unprincipled, and Burr despising Washington, and ever underrating his services to his country.

The bravery and genius of Burr, however, brought him promotion in the army, and as commander of a regiment he showed himself an accomplished soldier. At the end of the war he did not lay aside its arts, but carried them into his chosen profession—the law—and, indeed, into every walk of life. He strove for victory in every enterprise, and he hesitated not at any means which was necessary to accomplish his ends. The destruction of those who stood in his way was his object, and any artifice to effect this he deemed meritorious.

At the close of the Revolution Burr married happily, and settled in the city of New York as a lawyer; and very soon he and Alexander Hamilton were recognized as leaders of the bar. But his restless spirit was not satisfied with the triumphs of his profession. He entered the arena of politics. In this his rise was so rapid as to be without precedent. In 1783 he was elected to the Legislature of New York; in 1789 was made Attorney-General of the State; in 1791 was elected a Senator of the United States; in 1792 was nominated for the Supreme Court of the State, which he declined; in 1800 he was voted for as President of the United States, receiving the same number of votes as Mr. Jefferson. The election was, thereupon, thrown into the House of Representatives, where, after a prolonged struggle, Jefferson was elected President; and, as the Constitution then provided, Burr, who received the next highest vote, became Vice-President. In that high office he conducted himself with distinguished ability. During his term the impeachment of Judge Chase was tried in the Senate, and his conduct as presiding officer was said to be worthy of all praise. But before his term expired he was guilty of an act which proved to be his ruin. Both at the bar and in politics Burr and Hamilton had been opponents and rivals for years. Hamilton had been imprudent in expressing to his friends and others his low estimate of Burr's moral character, and some one had been still more imprudent in putting Hamilton's opinion of Burr in a newspaper. Burr, on seeing the publication, addressed a letter to Hamilton demanding a disavowal of the language. This Hamilton was not prepared to make in the terms required, yet he attempted to avoid a personal difficulty, but in vain. Burr seems to have determined to kill his rival. He challenged him to a duel, and by all means in his power forced Hamilton to meet him,

although the latter attempted to avoid such an issue in every way considered honorable, except to decline outright, which, as such matters were then regarded, would have disgraced him in the eyes of the public. On July 11, 1804, the duel was fought soon after sunrise on the bank of the Hudson, under the heights of Weehaukin, and Hamilton fell mortally wounded. The cool and imperturbable conduct of Burr on the occasion was without precedent. At daybreak of the fatal morning when a friend entered his chamber, to arrange for the meeting, Burr was found to be in profound sleep. On the ground he waited till Hamilton's pistol had fired, apparently before it was aimed, and then deliberately took aim at a vital part of his body, and fired. Returning to his home in the city, he went into his library and commenced his usual employment, when a cousin from Connecticut called and was entertained at breakfast. Neither in his manner nor conversation was there any evidence of excitement or concern; and when his guest, on leaving the house and going into the city, was met with the rumors of the duel, he denounced them as false, so convinced was he by Colonel Burr's manner that nothing of the sort could have happened. Twenty-five years afterwards he visited the scene of the duel, placed a friend on the spot where Hamilton stood, took his own position, and went over the details of the duel, justifying himself for having killed Hamilton.

This celebrated duel had two effects. The bullet that took the life of Alexander Hamilton destroyed the future of Aaron Burr in this life, if not in the life beyond. The fall of so great a man as Hamilton, under the circumstances made known by the published correspondence leading up to the duel, aroused the most intense feeling against Burr, not only among the Federalists, of whom Hamilton was the acknowledged leader, but among the better class of the Republicans, with which party Burr acted. Two grand juries, one in New York, where Hamilton died, and one in New Jersey, where he was shot, indicted Burr for murder. The feeling aroused against him was directed against the practice of duelling, and was the cause of its being put under the ban of society in the North. Burr escaped from the city of New York, and made his way to the home of Joseph Alston, of South Carolina, who had married Theodosia, his only child. The attachment between this beautiful and talented woman and her father was the one thing which prevents that father from being utterly despicable in his after life; and the sad taking off of herself and her son, her only child, was the stroke that completed the wreck of this

remarkable man. Though under indictments for murder which he dare not face, Burr continued to preside over the Senate till the close of his term, and then, a fugitive from his home in New York, he traveled in the western and southwestern portions of the United States, which then embraced the Louisiana purchase, with a view of finding some place where he might begin life anew. It was a time when our relations with Spain threatened open rupture, and a military force under General James Wilkinson, Commander-in-Chief of the United States Army, was stationed near the boundary line of Mexico, ready for any emergency, and when the people in the Mississippi valley, not yet connected with the East by railroads crossing the Alleghanies, were believed to be indifferent to the Union, which had been for so long a time delinquent in guarding their interests which were involved in obtaining from Spain the free navigation of the Mississippi to the Gulf. It is well known that after the Revolution both Spain and England plotted to separate this magnificent territory from the Eastern States, and that many in the New England States were not averse to the separation.

The fertile, restless brain of Burr, taking advantage of conditions which seemed more favorable for his designs than they really were, conceived the idea of conquering Mexico, dividing the Union by the Alleghany mountains, and making himself the ruler of a new empire embracing this vast territory, with his capital at New Orleans. To conceal his plans from the public he purchased of one Balstrup four hundred thousand acres of land on the Washita, in the Louisiana territory, and gave out that he wanted men to settle this tract. The scheme seems to us now to have been the dream of a madman, and yet in the then condition of Mexico, dissatisfied with Spanish rule, and of the western States and territories, bearing the burdens and enjoying but few of the benefits of the Union, the scheme did not seem impracticable to this bold, ambitious and desperate man; and he managed to enlist with him some men of decided ability, and of experience as public officers. Among these were Joseph Alston, his son-in-law, and the future Governor of South Carolina; Jonathan Dayton, an ex-Speaker of the House of Representatives and later a Senator from New Jersey, and John Smith, an ex-Senator from Ohio. The man, however, who was most prominently connected with Burr in the eyes of the public was Herman Blannerhasset. This man, whose connection with Burr was so pathetically disastrous, was an Irishman of wealth and culture, who had purchased, and greatly improved for his home, an

island in the Ohio river a few miles below Marietta. On a voyage down the Ohio Burr had called at the island, and had been hospitably entertained by Blannerhasset and his accomplished wife. He soon discovered that his host was of that impulsive, confiding character which made him an easy victim to his alluring plans. With the captivating address for which he was celebrated, Burr attached Blannerhasset to his schemes, and soon had his energies and his fortune at his command. It seems that Burr did not confide to all his associates the full extent of his schemes, but kept back from nearly all of them his designs on the integrity of the Union. He made prominent his proposal to revolutionize Mexico, and to at least detach from Spanish control the northern part, now constituting the State of Texas. He claimed that he had assurances that the army and navy of the United States would join him, and that England, if not active in his behalf, would not interfere. Many men were enlisted in his enterprise by promise of fortunes in Mexico, or by interests in the Balstop purchase. Burr's reliance on aid from the United States army was based upon his faith in General James Wilkinson, Commander-in-Chief and Governor of the territory of Louisiana, who with a small force was facing the Spanish in the disputed territory along the Sabine river.

This man who played false to Burr, and by so doing thwarted his plans, occupies an unenviable position on the page of his country's history. He had been with Burr in the campaigns against Canada during the Revolution, and had been his intimate friend afterwards. He had early displayed a disposition for intrigue, being one of the Conway cabal, formed to displace Washington from the command of the Continental army. After the Revolution he had moved to Kentucky, and had been the agent of Spain in her attempts to corrupt the leading men of the Mississippi valley, with a view to the separation of the Western territory from the Eastern States. He had for years enjoyed a pension from Spain, and had been charged with the disposition of the corruption fund she furnished for the dirty work he had undertaken. His enmity to Washington had made him a republican, and Mr. Jefferson, ignorant of his true character, had given him the high positions of commander-in-chief of the army and governor of Louisiana. Burr counted on him to commence hostilities with Spain, and thus furnish a pretext for his contemplated invasion, which he claimed would be welcomed by the Catholic priesthood and others, and would be favored by the United States authorities, and so made successful. After arranging for a rendezvous of enlisted men on



Blannerhasset's island to be conveyed down the river in boats, and to be joined at the mouth of the Cumberland by others gathered in Tennessee and Kentucky, led by himself, Burr wrote a letter to Wilkinson in cipher and sent it by an intimate friend, Samuel Swartout, apprising him that everything was ready for the realization of his plans; that he expected to be at Natchez between December 5th and 15th with the first detachment of his men, numbering between five hundred and a thousand; and that Wilkinson would meet him there to be second in command, and to plan for their future movements. This letter was delivered by Swartout on October 8th, 1806, who orally informed Wilkinson of such details as had been determined upon. Wilkinson was now brought face to face with a most important question. Ought he to give up his position in the army and civil service of the United States to engage in a scheme of very doubtful issue, to say the least of it; a scheme which defied the laws and required him to be untrue to that country whose commission he bore, and to Spain, whose pensioner he had been? He determined to turn his back on Burr, and, moreover, to dispatch a messenger to President Jefferson and apprise him of Burr's designs. The messenger reached Washington and delivered his dispatches November 25th, and on the 27th the President issued his proclamation announcing that unlawful enterprises were on foot in the Western States, warning all persons to withdraw from the same without delay, and commanding all officers, civil and military, to exert themselves to bring the offending parties to punishment. Burr was not mentioned by name in the proclamation, but so rife had been the rumor of his mysterious designs, that he was at once recognized as the leader of the unlawful enterprise denounced. Before this, however, he had passed through a severe ordeal, which threatened to expose his schemes to the public. On 3d November, 1806, Daviess, the United States District Attorney, had moved the Federal court sitting at Frankfort, Ky., for process against Burr, to answer the charge of being engaged in an enterprise contrary to the Act of Congress which prohibited military expeditions against nations at peace with the United States. The judge, Henry Innis, who had been in the Spanish conspiracy, denied the motion, but Burr, who was in Lexington, at once came to Frankfort, and, with lofty bearing, asked an investigation of the charge, which was ordered by the court. On the day fixed he appeared in court with Henry Clay and Colonel John Allen as counsel. The inability of Daviess to secure the attendance of witnesses caused the discharge of Burr without the proposed investi-

gation. Before Mr. Clay would appear for Burr he required him to make a disavowal in writing of all unlawful designs, which was fully and explicitly given, with a statement that his plans had been explained to several distinguished members of the administration, and had the approval of the Government. When Mr. Clay afterwards found that this statement was false from beginning to end, he regarded Burr with well-merited contempt; and when the two men later in life accidentally met, and Burr extended his hand, Clay refused to take it, and plainly showed his aversion to the mean, guilty creature he had once been induced to defend, by a shameless falsehood, as an innocent man.

The effect of Mr. Jefferson's proclamation was destructive of Burr's plans. Most of the boats built for Burr were seized at Marietta by the militia of the district, which had been called out by the authorities of Ohio. The militia of Wood county, Virginia, within whose bounds was Blannerhasset's Island, were called out to arrest the men assembled there. These were only thirty or forty in number, and they, with Blannerhasset, escaped in four boats under the cover of night. The militia, enraged at their escape, destroyed or injured nearly all of Blannerhasset's property, and made his island a waste. At the mouth of the Cumberland the would-be filibusters were joined by Burr, and the expedition now numbered thirteen boats and about sixty men. Burr, ignorant of the defection of Wilkinson, inspired his men with confidence, promising the all-important aid of the United States army; and so they continued their journey down the Mississippi. In the meanwhile Wilkinson, having determined to act the part of a patriot, displayed unexpected energy. He effected a truce with the Spanish commander, which enabled him to withdraw his troops from the vicinity of the Sabine, and hastily repairing to New Orleans, took steps to defend that city from an attack by Burr, which he expected would be made with a large force. As military commander, he proclaimed martial law, and by his excited manner created a most painful alarm in the city. Finding Samuel Swartout and Erick Bollman, two of Burr's confederates, in the city, he arrested them and shipped them by a schooner to Baltimore, to be delivered as prisoners at Washington. There they were brought before the Supreme Court by writ of *habeas corpus*, and discharged because of the insufficiency of the information on which they had been arrested. But the public feeling against Burr had been intensely aroused by the message of the President to Congress embodying the information derived from Wilkinson and from

General William Eaton, to whom Burr had very fully revealed his plans against Mexico, and his hopes of a division of the Union. Burr, in blissful ignorance of what was occurring, and, with the confidence of Don Quixote, was slowly floating down the Mississippi with his sixty men to commence the conquest of an empire. At Bayou Pierre, thirty miles below Natchez, he, for the first time, heard of the conduct of Wilkinson, of the excitement in the country, and of the proclamation of the Governor of the Territory of Mississippi ordering the arrest of himself and his men. Coming to a halt, he was soon threatened by a force of militia, and deemed it best to surrender to the civil authorities of the Territory, by which he was bailed to appear in court to answer an indictment of a grand jury. The grand jury refused to indict him, and the court refused to release him from his bail bond, expecting to take further proceedings against him. Thereupon, Burr made his escape in disguise, and attempted to reach the port of Pensacola and get aboard a British man-of-war. In passing through Alabama he was recognized and arrested by Colonel Perkins, and conveyed to Richmond, Virginia, under a military guard. Perkins had never seen him, but recognized him by his brilliant eyes, so often described. By this time Burr had become a prominent figure in party politics. The Republican friends of Mr. Jefferson upheld him in his active efforts to bring him to trial for treason, while the Federalists embraced the cause of Burr, and claimed that he was only planning an attack on Mexico in case of war with Spain, which the President in his message to Congress had indicated might be expected. Thus, by a curious shifting of party relations, the man who had carried New York city and secured the first triumph of the Republican party in the election of Mr. Jefferson as President, was now at enmity with that party, and was upheld by his old political enemies, the Federalists.

On March 30, 1807, Burr was brought before Chief Justice Marshall, in the custody of Major Joseph Scott, Marshal of the district, in a private room of the Swan Hotel, east Broad street, between Eighth and Ninth streets, on a motion for his commitment, on two charges: one for high misdemeanor in setting on foot a military expedition against the Dominion of Spain, with whom the United States was at peace, and the other, of treason against the United States. The hearing was continued till the next day, and was thereafter held in the hall of the House of Delegates in the Capitol. And now commenced that celebrated legal contest which, with but little intermission, lasted for six months, and in which the ability, learning, ingenuity, and elo-

quence of counsel equalled any ever displayed in this, or possibly any other, country. We are indebted to David Robinson, a lawyer of Petersburg and a shorthand reporter, for a full report of the proceedings.

On this preliminary motion Cæsar A. Rodney, Attorney-General of the United States, and Colonel George Hay, Attorney for the District of Virginia, appeared for the prosecution, while Edmund Randolph and John Wickham appeared for Burr. The Chief Justice, on April 1st, refused to commit for treason, considering the affidavits presented insufficient for this, they having been so held by the Supreme Court in the case of Bollman and Swartout; but he required bail of Burr on the charge of high misdemeanor. On May 22, the United States Court convened at Richmond—Judge Cyrus Griffin sitting with the Chief Justice—and Burr appeared with Edmund Randolph, John Wickham, Benjamin Botts, and John Baker, as his counsel; while for the prosecution George Hay, William Wirt, and Alexander McRae appeared. On May 28, Luther Martin, and on August 17th Charles Lee also appeared for Burr. And now let us briefly sketch the court and counsel. In the “British Spy,” written in 1803, we have the following pen-picture of Chief Justice John Marshall, the presiding judge, drawn by a master hand:

“The Chief Justice of the United States is, in his person, tall, meager, emaciated; his muscles relaxed, and his joints so loosely connected as not only to disqualify him, apparently, for any vigorous exertion of the body, but to destroy everything like elegance and harmony in his air and movements. Indeed, in his whole appearance and demeanor, dress, attitudes, gesture—sitting, standing or walking—he is as far removed from the idolized graces of Lord Chesterfield as any other gentleman on earth. To continue the portrait: his head and face are small in proportion to his height; his complexion swarthy; the muscles of his face, being relaxed, give him the appearance of a man of fifty years of age, nor can he be much younger; his countenance has a faithful expression of great good humor and hilarity; while his black eyes—that unerring index—possess an irradiating spirit, which proclaims the imperial powers of the mind that sits enthroned within.

“This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world, if eloquence may be said to consist of the power of seizing the attention with irresistible force, and never permitting it to elude the grasp, until the hearer has received the conviction which the speaker intends.

“He possesses one original and, almost, supernatural faculty: the faculty of developing a subject by a single glance of his mind, and detecting at once the very point on which every controversy depends. No matter what the question, though

ten times more knotty than the gnarled oak, the lightning of heaven is not more rapid nor more resistless than his astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape and take in its various objects with more promptitude and facility than his mind embraces and analyzes the most complex subjects."

He had volunteered at twenty, among the first Virginia troops, and distinguished himself in a number of battles of the Revolution, studied law under Chancellor Wythe, and in years had become the leader of the Richmond bar. As a special commissioner to France, and a member of Congress, he had won great distinction, and had been appointed Secretary of State, and afterwards Chief Justice of the United States, by President Adams. He was a Federalist in politics, but not extreme in his views. He had now been on the bench six years, but had delivered only two of those celebrated opinions on constitutional questions which have made him famous. I refer to his opinions in the case of *Ex Parte Bollman and Swartout* (4 Cranch, 75) and *Marbury v. Madison* (1 Cranch, 137).

The relations between the Chief Justice and the President were far from amicable. In delivering the opinion of the court in *Marbury v. Madison*, Marshall had held that the action of the President was improper in withholding commissions fully executed from certain appointees of his predecessor, who had been confirmed by the Senate, but that the Supreme Court had not jurisdiction to enforce their delivery by *mandamus*, because, though attempted to be conferred by Congress, it was not authorized by the Constitution—thus making the Constitution, as construed by that court, the supreme law of the land, and annulling an Act of Congress. Both of these positions were distasteful to Mr. Jefferson, and he regarded the opinion as a defiance to him. Nor was his irritation lessened by the opinion of the court delivered by the Chief Justice in *Little v. Barrene* (2 Cranch, 17), in which it was held that the President's orders to commanders of American vessels to search vessels leaving French ports, were illegal and the commanders liable in personal damages for obeying them.

The President was also offended by the discharge of Bollman and Swartout. But the greatest offence given him by Marshall was his *Life of Washington*, in which Jefferson and his party were severely handled. A most unfortunate blunder had given color to the President's charge of partiality on the part of Marshall towards Burr and his associates. After Burr had been admitted to bail, and before the

session of the court at which he was to appear, one of his counsel, John Wickham, gave a dinner, and invited the Chief Justice to it. After accepting the invitation, he found that Burr had also been invited—a strange lack of propriety in Mr. Wickham. Judge Marshall, fearing to offend Mr. Wickham by refusing to attend, went to the dinner, but had no intercourse with Burr. Soon realizing, however, the impropriety of his action, he retired from the entertainment. This is the account of Professor George Tucker, who seemed to have been present, but others say the Chief Justice was not aware that Burr was to be a guest until he reached Mr. Wickham's house. However that may be, the incident was deeply deplored by him, and was freely used by his enemies. On the other hand, the friends of Burr complained of a passage in Marshall's opinion in *Ex Parte Bollman and Swartout*, which seemed to uphold the doctrine of constructive treason, a doctrine so murderously prominent in the history of English criminal law.

It was under these trying circumstances that Judge Marshall presided over this important trial, during which he was called upon to decide many new and intricate questions, some far-reaching in their consequences. By his side sat Cyrus Griffin, Judge of the District, an able man and one of great experience and accomplishments as a legislator and judge.

In front, in striking contrast with the Chief Justice, sat the accused, faultlessly attired, small in stature—being only five feet six inches high—with a large head and very handsome face, and a pair of brilliant dark eyes. His manner was as dignified and self-possessed as though he were on the bench presiding, instead of being at the bar on trial for his life.

George Hay, the District Attorney, and, technically, the leader of the prosecution, was a son-in-law of James Monroe, and a man of considerable reputation in his profession, which won for him afterwards the Federal judgeship of the District. In the contests in which they were now engaged, however, he was eclipsed by his associates.

Joined with him were Alexander McRae and William Wirt, the first a Scotchman by blood, with the acuteness and determination of that race, a man of very considerable ability, and of fine professional attainments. He was at the time Lieutenant-Governor of Virginia, afterwards was consul at Paris, and finally died in London, where he had been engaged in some disastrous speculations.

William Wirt was the Coropheus of the prosecution. He was then thirty-five years of age, and had already won great distinction in his

profession and with his pen. His personal appearance was as striking as that of Judge Marshall or Colonel Burr, though very different from either. He had a tall figure, ample chest, erect carriage, and conspicuous ease and grace of motion. His head was large, but in proportion to his body. A large nose, thin and accurately formed lips, a chin which gave to his countenance a square rather than an oval outline, clear, dark blue eyes beneath brows of wide compass, a majestic forehead, and an abundant growth of curled crisp hair, made him a model for a sculptor or a painter. His voice was clear, sweet and musical, and admirably modulated. He was a brilliant orator, a fine logician, and an accomplished lawyer. He won more reputation in this trial than any of the other counsel, and was the favorite with the audience, which always became perfectly still and attentive whenever he addressed the court.

The counsel for Colonel Burr presented a remarkable array of talent and legal acquirement. The most distinguished, as to the high offices he had held, was Edmund Randolph, who had been successively Attorney-General and Governor of Virginia, and Attorney-General and Secretary of State under Washington's administration. He is thus sketched in the "British Spy:"

"Mr. Randolph has great personal advantages. A figure large and portly; his features uncommonly fine; his dark eyes and his whole countenance lighted up with an expression of the most conciliating sensibility; his attitudes dignified and commanding; his gesture easy and graceful; his voice perfect harmony; and his whole manner that of an accomplished and engaging gentleman. I have reason to believe that the expression of his countenance does no more than justice to his heart. If I be correctly informed, his feelings are exquisite; and the proofs of his benevolence are various and clear beyond the possibility of doubt. He has filled the highest offices in this Commonwealth, and has very long maintained a most respectable rank in his profession. His character, with the people, is that of a great lawyer and eloquent speaker."

Mr. Randolph's speeches in this case prove that Mr. Wirt in this sketch underrated his rank in his profession.

Next to Mr. Randolph, we notice John Wickham, who was in fact the leading counsel for the accused. He was thus sketched in the "British Spy:"

"He is, I am told, upwards of forty years of age; but his look, I think, is more juvenile. As to stature, he is about the ordinary height of men; his form genteel, his person agile. He is distinguished by a quickness of look, a spritely step, and that peculiar jaunty air, which I have heretofore mentioned, as characterizing the people of New York. It is an air, however, which (perhaps because I am a plain son of *John Bull*,) is not entirely to my taste. Striking, indeed, it

is; highly genteel, and calculated for *éclat*; but then, I fear, that it may be censured as being too artificial. . . . The qualities by which Mr. Wickham strikes the multitude, are his ingenuity and his wit. But those who look more closely into the anatomy of his mind, discover many properties of much higher dignity and importance. This gentleman, in my opinion, unites in himself a greater diversity of talents and acquirements than any other at the bar of Virginia. He has the reputation, and I doubt not a just one, of possessing much legal science. He has an exquisite and highly cultivated taste for polite literature; a genius quick and fertile; a style pure and classic; a stream of perspicuous and beautiful elocution; an ingenuity which no difficulties can entangle or embarrass; and a wit whose vivid and brilliant coruscation can gild and decorate the darkest subject. He chooses his ground, in the first instance, with great judgment; and when, in the progress of a cause, an unexpected evolution of testimony, or intermediate decisions from the bench, have beaten that ground from under him, he possesses a happy, an astonishing versatility, by which he is enabled at once to take a new position, without appearing to have lost an atom, either in the measure or stability of his basis. This is a faculty which I have observed before in an inferior degree; but Mr. Wickham is so adroit, so superior in the execution of it, that in him it appears a new and peculiar talent; his statements, his narrations, his arguments, are all as transparent as the light of day. He reasons logically, and declaims very handsomely."

Hardly less able, as he proved himself in this case, was Benjamin Botts, a young man of great nerve and of a clear, logical mind, whose speeches compare favorably with any delivered during the trial, and who especially attracted the notice and commendation of the Chief Justice. He unfortunately was lost in the burning of the Richmond Theatre, sacrificing his life in his effort to save that of his wife. He was the father of a son more celebrated for intellect and oratory than himself. I refer to the late John Minor Botts, named after a lifelong friend of his father, the distinguished lawyer of Fredericksburg, John Minor.

The counsel who came to the defence with most reputation was Luther Martin, of Maryland. With the warmest friendship for Colonel Burr, he was his opposite in almost everything. He was coarse in manner and speech. His dress was a compound of the fine and the common, and appeared never to have felt the brush. Although long since discarded by others, he still wore at his wrist ruffles deeply edged with lace, which were usually dabbled and soiled. His manner was rude, and his speech ungrammatical and verbose. He had become very intemperate, and altogether was gross in person and habits, and was properly styled the "*Thersites* of the Bar." With all this he was a profound lawyer. His reading was very great, and he forgot nothing he had read. Though loading down his argument with learn-



ing, and often with extraneous matter, he never missed the strong points in his case, and was an antagonist to be feared, as we learn from Chief Justice Taney, who was at the bar with him.

Charles Lee, who had been Attorney-General of the United States, came into the trial too late to take a conspicuous part, but the few speeches he made sustained his reputation as a very able lawyer.

The remaining counsel for Burr was a certain "Jack" Baker, a lame man with a crutch, a merry fellow, full of coarse wit and anecdote; no speaker and no lawyer, who seemed to have joined himself to Burr's counsel in order to make himself conspicuous; and he in truth thereby saved his name from oblivion.

We learn from Blannerhasset that all of Burr's counsel served him without compensation; and the fact indicates the intensity of the personal and party feeling that existed against Mr. Jefferson, who had caused Burr to be arrested and brought to trial. To the brilliant array of counsel for the defence, we must add Burr himself, who seems to have directed, or suggested, every step, and who often addressed the court in short, crisp speeches, which clearly and forcibly stated his points.

The first step in the defence was an objection to the entire panel of the grand jury, as improperly summoned. This being overruled, challenges for favor were allowed, and prevailed as to William B. Giles and Colonel Wilson C. Nicholas, both United States Senators from Virginia. Finally the following persons were sworn as the grand jury: John Randolph, of Roanoke (foreman), whose genius and eccentricities had already given him the widest reputation, and who was afterwards United States Senator and Minister to Russia; Colonel Joseph Eggleston, the distinguished Revolutionary soldier, whose name was to be borne by one of the greatest soldiers of our time, General Joseph Eggleston Johnston; Joseph C. Cabell, a man of remarkable intellect and accomplishment, who was the father of the James River and Kanawha canal, and, with Mr. Jefferson, a founder of the University of Virginia; Littleton Waller Tazewell, the distinguished lawyer and statesman, who, both at the bar and in the Senate of the United States, was classed with the foremost in the land, and who afterwards became Governor of Virginia; General Robert Taylor, one of the foremost of the citizens who have illustrated the history of Norfolk city; James Pleasants and James Barbour, both eminent lawyers, and afterwards Governors of Virginia and United States Senators, Barbour also becoming a Cabinet member and Minister to England; Dr. John

Brockenborough, the able bank president, who afterwards owned and resided at the Warm Springs; William Daniel, a distinguished judge, whose talents were inherited first by his son, Judge William Daniel, of the Court of Appeals, and afterwards by the present distinguished Senator from Virginia, Major John W. Daniel; James Garnett, a member of Congress, distinguished for his writings on agriculture and education. The other members were John Mercer, Edward Pegram, Munford Beverly, John Ambler, Thomas Harrison and Alexander Shephard, men of high standing and intelligence.

Judge Marshall charged the grand jury, dwelling on the definition of treason and the testimony requisite to prove it. But this did not satisfy Colonel Burr, who asked that the jury be instructed as to the admissibility of certain evidence, which he supposed would be laid before it. After a discussion of this motion, Colonel Hay pledged himself that no evidence should be laid before the grand jury without notice to Colonel Burr's counsel, and the further discussion was adjourned. But this was followed by a motion of the prosecution to at once commit Burr for treason, which seemed to take the defence by surprise. Upon this motion Mr. Wirt made his first speech—a fine forensic effort. After a lengthy debate, the court held that the motion could be made before any action of the grand jury, and directed the evidence to be introduced, on which it would rest. Now began a contest as to the order in which the evidence should be introduced, Colonel Burr insisting that the prosecution be first required to prove the overt act of treason before any other evidence should be allowed. While this motion was under discussion, Colonel Hay moved that Colonel Burr's bail bond be increased. This was, of course, resisted; but, as Colonel Burr saw what the effect would be if the court granted it, he expressed his willingness to enlarge the penalty, and thus avoided the ill effects of such a requirement by the court. The motion to commit was not pressed afterwards. The prosecution could make but little headway before the grand jury without the testimony of General Wilkinson, who had been ordered by the President to leave his post at New Orleans and repair to the court at Richmond. He took his time on the journey, and only arrived on the 14th of June. On the next day he appeared in court, in full uniform, and was sworn and sent to the grand jury. The scene in court at that time was dramatic. When the portly form of the General appeared and advanced to the clerk's desk to be sworn, his manner was calm and dignified. All eyes were turned upon him, except those of Burr, who was conversing with his

counsel. Presently he turned slowly around, and his eyes met those of Wilkinson, when Burr's keen, brilliant eyes gave expression to withering contempt.

On the 9th of June, before the arrival of Wilkinson, Colonel Burr moved the court to issue a *subpœna duces tecum*, requiring the President of the United States to produce in court the original letter written to him by General Wilkinson the 21st of October, 1806, and also certain orders, issued by the army and navy departments, which he claimed would show that the President had unlawfully directed the destruction of himself and his property. On this motion a very able debate was had, lasting for four or five days, in which Mr. Wirt added greatly to his reputation. A studious effort had been made from the first by Colonel Burr and his counsel to represent him as an innocent, persecuted man, and Mr. Jefferson as his persecutor. On the discussion of this motion, however, the speech of Luther Martin was a bitter and coarse attack upon the President, in which he described the administration as "blood-hounds." Mr. Wirt, in an eloquent reply, sharply rebuked the court for allowing the executive branch of the government to be abused and reviled by the defence without interruption. The force of this the court evidently felt, as Judge Marshall noticed it, and stated that the counsel on both sides had acted improperly in endeavoring to excite the prejudices of the people. On June 13th the Chief Justice delivered the opinion of the court granting the motion for a *subpœna duces tecum* against the President, and basing it upon the Eighth Amendment to the Constitution, which gives to the accused the right to have "compulsory process for obtaining witnesses in his favor," and on the Act of Congress made to enforce this provision.

As Colonel Hay had offered to get certified copies of all the papers required, it would seem that the defence only wished to annoy Mr. Jefferson, and this was done effectually. He directed the Attorney-General to turn over to Colonel Hay the letter of Mr. Wilkinson, only such parts to be produced as Colonel Hay thought were proper and pertinent to Colonel Burr's defence. He asked for more specific mention of the orders of the army and navy desired, and refused to appear in court as a witness, claiming that, as chief executive, he could not be compelled to leave his duties at the call of any citizen, and intimating that if the court attempted to enforce its writ, he would forcibly resist it. He showed great disgust with the motion, the debate upon it, and the opinion of the Chief Justice, and suggested to Colonel Hay the com-

mittal of Luther Martin as *particeps criminis* with Burr, calling Martin "an unprincipled, impudent Federal bull dog." The court, although moved to do so, did not attempt to enforce its process by attachment, but let the matter drop, with the idea that, although the prisoner had a right to have the writ issue, the President had the right to say whether his duties as chief executive prevented his obeying it in person. Just here let me say, that I have not found that Mr. Jefferson did anything in the apprehension and prosecution of Burr which his duty did not require. He showed himself in a bad light, however, in his attacks on Marshall for his conduct in the case, which he denounced as actuated by party spirit. But the opinions delivered by Judge Marshall in this case have stood the test of time, and show him to have been as impartial as he was able.

It was necessary for the defence that the testimony of General Wilkinson be discredited; and we find counsel going out of their way to denounce him. On June 19th a motion was made to attach him for obstructing the free administration of justice by using his military authority to intimidate and coerce the attendance of James Knox, a witness against Burr. This man had been summoned as a witness while in New Orleans, and, showing a disposition to disobey the process, had been arrested by an order of Judge Hall, under the dictation, it was alleged, of Wilkinson, and sent under guard to Richmond. The motion did not prevail. While it was under discussion, and while Mr. Botts was speaking, on the 24th of June, about two o'clock, the marshal informed the court that the grand jury wished to enter. Instantly a dead silence fell upon the crowded court room, and the tall, attenuated figure of John Randolph appeared at the head of the jury. In his clear, musical, yet piercing voice, he addressed the court, and stated that they had agreed upon several indictments, which he handed to the clerk. Thereupon the clerk read the endorsements as follows: "An indictment against Aaron Burr for treason. A true bill." "An indictment against Aaron Burr for misdemeanor. A true bill." And the same against Herman Blannerhasset.

Now, for the first time, Burr lost his perfect self-possession, and made a motion for bail, on the shallow ground that the indictment for treason against him had been obtained by perjury. When the court called for authority for such a remarkable position, the learned counsel had to acknowledge that they knew of none, and the prisoner was committed to the custody of the marshal, who carried him to the jail of the city. On June 26th true bills were returned for treason and

misdeemeanor against Jonathan Dayton, John Smith, Comfort Tyler, Israel Smith and Davis Floyd, who had been associated with Burr. On the same day on affidavits of his counsel that commitment in the city jail would endanger Burr's health, and prevent his having necessary access to his counsel, the court ordered the front upper room of the house occupied by Luther Martin, which had been used as a dining room, to be fitted with bars and locks, and guarded by seven men, placed at the door and on the adjoining unfinished building, and that Colonel Burr be confined there. This house is still standing at the southwest corner of Broad and Ninth streets, and the lower floor is occupied as an apothecary's store by Hugh Blair, Esq.

On June 29th the court adjourned to August 3rd, to give the marshal an opportunity to summon a *venire* from Wood county, in which Blannerhasset's Island was situated, and where the act of treason was laid. In the meantime Burr was removed for safe-keeping to the third story of the addition to the penitentiary, which had been just completed. Here he had the use of three rooms; and they were soon thronged with visitors, and with servants bringing the delicacies of the season—many with the compliments of ladies—for he had found and made warm friends in Richmond, who regarded him as a victim to Mr. Jefferson's hate, and believed that he only desired to take part in the expected war with Mexico. Here, too, his beloved daughter visited him, and thereafter remained with him till the end of his trial. His wife had been long in her grave. As Burr arose in favor in Richmond, Wilkinson became the object of dislike. He in truth had a most disagreeable experience. Considering himself insulted by John Randolph while before the grand jury, he challenged him, and was told by Randolph in reply: "I cannot descend to your level." Randolph had indeed most bitterly denounced him, and wrote of him to a friend: "Wilkinson is the only man that I ever saw who was from bark to core a villian. . . . Perhaps you never saw human nature in so degraded a situation as in the person of Wilkinson before the grand jury." And he declared that he would not have voted for the indictment of Burr, had he not believed Wilkinson would have been indicted also. It is said that when Wilkinson entered the jury-room in uniform with his sword by his side, Randolph called in the marshal and said to him: "Take that man out and disarm him. I will allow no attempt to intimidate the jury." Samuel Swartout, meeting Wilkinson on a narrow sidewalk, threw him into the street, and afterwards challenged him; and upon Wilkinson declining to accept, on the

ground that he did not recognize traitors as his equals, he posted him as a coward in the *Virginia Gazette*.

Among the great crowd that thronged the court-room during the trial, three young men, all with licenses to practise law, were seen, who afterwards rose to great eminence in other fields. They were Winfield Scott, Andrew Jackson and Washington Irving. Jackson was so certain of Burr's innocence that he made speeches at the corners of the streets in his favor. Irving came to Richmond to aid in the defence; but finding that so well provided for, he entertained himself with writing letters, which gave interesting pictures of the scenes, and especially of the first appearance of Wilkinson in court. He also gave an account of the attentions paid Burr by the people of Richmond.

In a contest so ardent and prolonged, we are not surprised to find that many sharp things were said by counsel of each other. Wickham seemed to take peculiar delight in attacking Hay, who, though not his equal, defended himself manfully. The disposition of Mr. Wickham to ridicule Mr. Hay appears in the reported cases in which they were counsel, and gave occasion in one of them for the most celebrated *jeu d'esprit* of Mr. Wirt. In replying to Colonel Hay, Wickham claimed to have reduced his argument to two unsound and inconsistent propositions, and exclaimed with triumph, "I have the gentleman between the two horns of a dilemma. He can take either, and his case is lost." Whereupon Jack Warden, familiarly called "Jock," whispered to Mr. Wirt, "*Habet foenum in cornu*," and Wirt wrote on a piece of paper, for the amusement of the court and bar:

"One day it happened in open court,  
Wickham tossed Hay on his horns for sport.  
Jock, full of wit and Latin too,  
Cried, '*Habet foenum in cornu*.'"

In these rough passages Martin was most conspicuous. But on one occasion he was completely silenced by Mr. McRae. Martin, while speaking, was interrupted by McRae, who made a suggestion looking to the saving of time. Whereupon Martin rudely said: "I know what kind of economy of time the gentlemen for the prosecution wish. They wish us to be silent. They would, if they could, deprive Colonel Burr's counsel of an opportunity of defending him, that they might hang him up as soon as possible to gratify themselves and the Government." To this Mr. McRae at once replied, "That is a most unprincipled, and most unfounded assertion." To this Martin made no reply, but behaved himself better thereafter. While many sharp

things are recorded by the reporter, he notes, every now and then, that pleasantries passed between the counsel, which he does not give, and which would have been much more interesting than the bitter things he records. It could not have been that two such genuine wits as William Wirt and John Wickham did not often enliven the proceedings by their sparkling sayings. Only one of Mr. Wirt's has come down to us so far as I know. Mr. Martin's favorite drink was rum, and he kept a glass of this by him. Once, while Mr. Wirt was reading an extract from a case cited, Martin interrupted him, saying: "I want no extracts, Mr. Wirt, no extracts." Whereupon Mr. Wirt replied: "You will except, I am sure, the extract of molasses."

By the Constitution, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. Congress shall have power to declare the punishment for treason, etc." Congress had declared that the punishment should be death.

The indictment charged Burr with levying war against the United States at Blannerhasset's Island, December 10, 1806, and with proceeding down the Ohio river with the traitorous design of taking possession of New Orleans, all within the district of Virginia and jurisdiction of the court.

On the sitting of the court, August 3d, a contest began as to the qualifications of the veniremen, which lasted till the 17th. Few, if any, of the Wood county men were accepted, and the bystanders were summoned finally. Edward Carrington, David Lambert, Richard E. Parker, Hugh Mercer, Christopher Anthony, James Sheppard, Reuben Blaky, Benjamin Graves, Miles Bott, Henry E. Coleman, John M. Sheppard and Richard Curd were sworn on the petit jury to try the prisoner. This panel, while not composed of as many distinguished men as the grand jury, contained men of a high order of intellect and character. During the challenges of the venire, one of the men made to stand aside created a sensation. As he left the stand he said to Colonel Burr: "I know why you object to me; my given name is Alexander Hamilton." After the statement to the jury by Colonel Hay on behalf of the prosecution, a contest arose as to the order in which the testimony should be offered, the defence claiming that the overt act of treason should be first found before any testimony be allowed connecting the prisoner with it. After a warm and able debate,

the court decided to allow the prosecution to introduce its evidence according to their judgment, reserving the right to exclude such as appeared to be irrelevant. General Eaton was thereupon called, who testified as to Burr's conversations with him, unfolding his design to invade Mexico, and, if successful, to revolutionize the territory of the United States west of the Alleghany mountains. Commander Truxton was next called, and testified to Burr's confiding to him his scheme against Mexico. After other testimony to the same effect, Jacob Albright, a laborer on Blannerhasset's Island, was introduced, who testified to the assembling of some twenty or thirty armed men there on December 10, 1806, and their flight down the river in boat at night; of the attempted arrest of Blannerhasset before leaving the island by a man called General Tupper, and the leveling of seven or eight muskets at Tupper, which caused him to desist. Other men testified to the presence of the armed men on the island, and their departure down the river; but no one else saw the attempted arrest of Blannerhasset; and though Tupper was in court, he was not examined.

It was admitted that Colonel Burr was not on the island on December 10, 1806, nor in the district of Virginia, but in Kentucky. All the evidence of the overt act on Blannerhasset's Island at the command of the prosecution having been introduced, the defence moved the court to arrest the further production of evidence intended to connect Burr with the occurrence on the island, as irrelevant and inadmissible, the overt act not having been proved as required by the Constitution. This motion, which required the court to pass on the sufficiency of the evidence of the prosecution, would necessarily end the case, if sustained by the court. Upon it arose a great legal contest, to which all that had gone before, which I have partially noticed, was but skirmishing. Mr. Wickham opened in a speech lasting the greater part of two days. He was followed by Mr. Randolph. Mr. McRae then occupied a day, and was followed by Mr. Wirt, whose speech contained the famous passage now a classic descriptive of Blannerhasset's Island, comparing it to the Garden of Eden, with Burr as the tempter. He was followed by Mr. Botts, and he by Colonel Hay. Mr. Lee then spoke, and was followed by Mr. Martin, and the argument, which lasted from the 20th to the 29th of August inclusive, was closed by Mr. Randolph.

As the words of the Constitution defining treason were taken from a statute of Edward III., and had been the subject of various decisions, and had been often discussed by text-writers, a wide scope was given



counsel for argument, and no one can read this grand debate without being impressed with the great learning and ability of the counsel. It richly deserves the judgment of Mr. Porton, Mr. Burr's biographer, who wrote that "it was doubtless the richest display of legal knowledge and ability of which the history of the American bar can boast."

On August the 31st the Chief Justice delivered his famous opinion sustaining the motion, which occupied nearly three hours in the reading. It contained a splendid tribute to the counsel, and reviewed clearly and with great ability the authorities in England and America, and the testimony which had been introduced, and showed that this last did not come up to the requirements of the Constitution; and, as a consequence, no evidence introduced to connect Burr with the facts proved was admissible. He held that by the American authorities there must not only be an assemblage of armed men, but the employment of actual force, to constitute levying war, though the English authorities did not uniformly require the actual exercise of force. Thereupon the case was submitted to the jury without argument, and they, in a few minutes, returned the following verdict: "We, of the jury, say that Aaron Burr is not proved to be guilty under the indictment by any evidence submitted to us; we therefore find him not guilty." Again Colonel Burr lost his self-possession, and protested vehemently against the form of the verdict. But the jury refused to change it, and so it was accepted.

"Marshall has stepped in between Burr and death," wrote Mr. Wirt to his friend Dabney Carr, September 1st.

"Why did you not tell Judge Marshall that the people of America demanded a conviction?" was asked of Mr. Wirt after the trial. "Tell *him* that!" was the reply; "I would as soon have gone to Herschel, and told him that the people of America insisted that the moon had horns, as a reason why he should draw her with them." Though giving great discontent to Mr. Jefferson and others, Marshall's decision is now acknowledged to have been right and proper; and it has had the effect of preventing in this country the disgraceful prosecutions for treason which so blot the pages of English history.

The indictment for raising an expedition against Mexico was next tried; but the prosecution broke down, as they could not prove any acts of Burr within the District of Virginia. The court, however, required of Burr a bail bond to ensure his presence before the Federal Court of Ohio, in which State he had made preparation for his expedition. He forfeited his bond, and in disguise sailed for England.

Want of time forbids me to further trace his wretched career, or to follow the future of the able counsel who made illustrious his trial. One pathetic incident I will mention as to Burr's last days. In his last sickness a friend amused him by reading from *Tristram Shandy*, and, among other passages, the incident of Uncle Toby and the fly, in which the kind-hearted old gentleman, instead of killing the fly that annoyed him, put it out of the window, saying: "Go, poor devil; get thee gone! Why should I hurt thee? This world, sure, is large enough to hold both thee and me." Whereupon Burr said, sadly: "If I had read *Sterne* more and *Voltaire* less I should have known that this world was wide enough for both *Hamilton* and me."

In tracing this celebrated trial, my thoughts have reverted to another indictment for treason within our memory, found in the Federal Court at Richmond, March 26, 1868, against a man superior in intellect to Burr, and immeasurably above him in moral character. I refer to the indictment of Jefferson Davis, the President of the conquered Southern Confederacy, under the dictation of the infamous Underwood, by a grand jury composed of ignorant free negroes and an inferior class of white men, popularly known as carpet-baggers and scalawags. In looking over the panel of this jury I recognize but one whom I ever met, and he was the colored barber, Lomax B. Smith, who so long kept a shop under the Exchange Hotel. He doubtless was the most respectable member of the jury. What a contrast with the jury which indicted Burr! On December 5, 1868, Mr. Davis appeared in court, haggard and worn by his long and cruel confinement at Fortress Monroe, from which he had not recovered after he had been allowed bail. Chief Justice Chase, an able and pure judge, who had studied his profession in the office of William Wirt, presided over the court. At his side, in the place of the upright and learned Cyrus Griffin, sat that paragon of ignorance and corruption, John C. Underwood. Two of the most accomplished lawyers that ever graced the American bar—Robert Ould and Charles O'Connor—appeared for the defence, while R. H. Dana, a distinguished Northern lawyer, and H. H. Wells, a carpet-bagger, appeared for the prosecution.

Mr. Jefferson, after whom Mr. Davis was named, had long been in his grave, but his influence on American institutions was still powerful, and was all on the side of the accused on this occasion; for if the right of revolution, embodied by him in the Declaration of Independence, as the very foundation of America's right to a separate government was allowed, or the Federal system was a compact between sovereign

States, as he taught, then Mr. Davis was not a citizen owing allegiance to the United States Government, after the secession of the Southern States, when the war had been levied; and if not a citizen owing allegiance to the United States, he could not commit treason against it. On the motion to quash the indictment the Chief Justice voted in the affirmative, while Underwood voted in the negative. Thereupon, the question was certified to the Supreme Court of the United States; and if ever decided by that court, no certificate of the fact has ever reached the lower court. But on February 11, 1869, the sureties on the bail bond were absolved, and the prosecution dropped, a happy solution of the difficult questions which confronted the Federal Government.

---

**SALES OF CHATTELS — RETENTION OF POSSESSION  
BY SELLER.**

---

The question which it is proposed to discuss briefly in this paper is the effect of non-delivery, or the retention of possession, by the vendor of a chattel, upon the title of a subsequent *bona fide* purchaser from the vendor. Reports and text-books abound in the discussion of the rights of *creditors* in such case, but in a somewhat elaborate search no discussion of the peculiar rights of the second *purchaser* has been found in any text-book, and decided cases involving such rights are comparatively rare. Wherever a text-writer deals with the subject, he confuses creditors and purchasers under the general designation of "third persons." The rule generally laid down in the books is that retention of possession is *prima facie* fraudulent as to third persons, but may be explained. And yet it is believed that whatever may be the rule as to creditors, or whatever differences of opinion may exist on that subject, there is practical unanimity amongst the courts as to the rights of subsequent *bona fide* purchasers in such case. And that rule is, that where the vendor of a chattel retains possession, and subsequently sells to a second *bona fide* purchaser for value, the latter's title will prevail over that of the first purchaser. There are innumerable *dicta* to the contrary, but the actual decisions are believed to be almost, if not altogether, unanimous in favor of the rule as stated.

There is some diversity of opinion as to the legal principles which induce the courts to prefer the second purchaser, but all reach practically the same result. These different views are: (1) That retention